

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

---

**MARY DERDA,**

**Plaintiff,**

**5:11-cv-1499  
(GLS)**

**v.**

**MICHAEL J. ASTRUE,**  
Commissioner of Social  
Security,

**Defendant.**

---

**APPEARANCES:**

**FOR THE PLAINTIFF:**

Olinksy Law Group  
300 S. State Street  
5th Floor, Suite 520  
Syracuse, NY 13202

**OF COUNSEL:**

HOWARD D. OLINSKY, ESQ.  
BRANDON W. SAWYER, ESQ.

**FOR THE DEFENDANT:**

HON. RICHARD S. HARTUNIAN  
United States Attorney  
100 South Clinton Street  
Syracuse, NY 13261

TOMASINA DIGRIGOLI  
Special Assistant U.S. Attorney

Steven P. Conte  
Regional Chief Counsel  
Social Security Administration  
Office of General Counsel, Region II  
26 Federal Plaza, Room 3904  
New York, NY 10278

**Gary L. Sharpe  
Chief Judge**

**MEMORANDUM-DECISION AND ORDER**

## **I. Introduction**

Plaintiff Mary Derda challenges the Commissioner of Social Security's denial of Disability Insurance Benefits (DIB) and seeks judicial review under 42 U.S.C. § 405(g). (See Compl., Dkt. No. 1.) After reviewing the administrative record and carefully considering Derda's arguments, the court affirms the Commissioner's decision and dismisses the Complaint.

## **II. Background**

On June 26, 2010, Derda filed an application for DIB under the Social Security Act ("the Act"), alleging disability since May 1, 2010. (See Tr.<sup>1</sup> at 100-09, 110.) After her application was denied, Derda requested a hearing before an Administrative Law Judge (ALJ), which was held on May 12, 2011. (See *id.* at 31-56, 59-64.) On June 1, 2011, the ALJ issued a decision denying the requested benefits, which became the Commissioner's final determination upon the Social Security Administration Appeals Council's denial of review. (See *id.* at 3-5, 19-27.)

Derda commenced the present action by filing a Complaint on

---

<sup>1</sup> Page references preceded by "Tr." are to the Administrative Transcript. (See Dkt. No. 10.)

December 20, 2011, wherein she sought review of the Commissioner's determination. (See Compl. ¶¶ 1-7.) The Commissioner filed an answer and a certified copy of the administrative transcript. (See Dkt. Nos. 8, 10.) Each party, seeking judgment on the pleadings, filed a brief. (See Dkt. Nos. 13, 15.)

### **III. Contentions**

Derda contends that the Commissioner's decision is tainted by legal error and is not supported by substantial evidence. Specifically, Derda claims the ALJ: (1) failed to fully develop the record; (2) rendered an inaccurate residual functional capacity (RFC); (3) improperly evaluated her credibility; and (4) erred at Step Four. (See Dkt. No. 13 at 9-18.) The Commissioner counters that substantial evidence supports the ALJ's decision. (See *generally* Dkt. No. 15.)

### **IV. Facts**

The evidence in this case is undisputed and the court adopts the parties' factual recitations. (See Dkt. No. 13 at 1-7; Dkt. No. 15 at 2-6.)

### **V. Standard of Review**

The standard for reviewing the Commissioner's final decision under 42 U.S.C. § 405(g) is well established and will not be repeated here. For a

full discussion of the standard and the five-step process used by the Commissioner in evaluating whether a claimant is disabled under the Act, the court refers the parties to its previous opinion in *Christiana v. Comm'r of Soc. Sec. Admin.*, No. 1:05-CV-932, 2008 WL 759076, at \*1-2 (N.D.N.Y. Mar. 19, 2008).

## **VI. Discussion**

### **A. Duty to Develop the Record**

Derda argues first that the ALJ violated his duty to develop the record by failing to: (1) “obtain a substantial amount of outstanding evidence”; and (2) “request treating physician opinions of limitations.” (Dkt. No. 13 at 9-12.) The Commissioner counters that the ALJ fulfilled his duty because, among other things, he possessed sufficient records, from the applicable time period, to render a decision. (See Dkt. No. 15 at 9-10.) The court agrees with the Commissioner.

While the ALJ has an affirmative obligation to develop the administrative record, his duty to do so is not without limit. See *Guile v. Barnhart*, No. 5:07-cv-259, 2010 WL 2516586, at \*3 (N.D.N.Y. June 14, 2010); see also 20 C.F.R. § 404.1512(d) (stating that generally, a complete record contains a “medical history for at least the [twelve] months

preceding the month in which” the claimant files her application). Indeed, if all of the evidence received is consistent and sufficient to determine whether a claimant is disabled, further development of the record is unnecessary, and the ALJ may make his determination based upon that evidence. See 20 C.F.R. § 404.1520b(a). Consistent with that notion, where there are no “obvious gaps” in the record, the ALJ is not required to seek additional information. *Rosa v. Callahan*, 168 F.3d 72, 79 n.5 (2d Cir. 1999). The ALJ must, however, “make reasonable efforts to obtain the claimant’s treating physician report.” *Streeter v. Comm’r of Soc. Sec.*, No. 5:07-CV-858, 2011 WL 1576959, at \*3 (N.D.N.Y. Apr. 26, 2011) (internal quotation marks and citations omitted). “[T]he lack of a medical source statement will not make the record incomplete” though, so long as the ALJ’s decision is “based on sufficient and consistent evidence.” *Id.* (internal quotation marks and citations omitted); see 20 C.F.R. § 404.1513(b)(6); *Perez v. Chater*, 77 F.3d 41, 48 (2d Cir. 1996).

Here, Derda appears to be arguing that the ALJ should have sought medical records for the ten years preceding her application. (See Dkt. No. 13 at 10.) Besides the fact that the regulations do not require such an extensive history, see 20 C.F.R. § 404.1512(d), the record here was

sufficiently robust for the ALJ to make a disability determination without requesting additional records or medical source statements from Drs. Paul Fiacco, Joseph Augustine or Seth Greenky. (See Dkt. No. 13 at 10-11); *Streeter*, 2011 WL 1576959, at \*3. In particular, the record contains an assessment from Derda's treating cardiologist, Dr. Russell Silverman, (see Tr. at 268-69), and a medical source statement from the consultative examiner, Dr. Roberto Rivera, (see *id.* at 283-88). Moreover, the ALJ also received records from CNY Family Care and CNY Eye Care, some of which predated Derda's application by over two years. (See *id.* at 216-41, 304-07.) Based on this evidence, which contains no obvious gaps or inconsistencies, the court concludes that ALJ's development of the record was sufficient to render a disability determination. See *Rosa*, 168 F.3d at 79 n.5. Derda's argument to the contrary is rejected.<sup>2</sup>

## B. RFC Determination

Derda next contends that the ALJ's RFC determination is inconsistent with the opinions of Drs. Silverman and Rivera. (See Dkt. No. 13 at 12-14.) The Commissioner, and the court, disagree. (See Dkt. No. 15 at 10-14.)

---

<sup>2</sup> Although Derda repeats this contention in her later arguments, further discussion of the ALJ's development of the record is unnecessary. (See, e.g., Dkt. No. 13 at 13.)

A claimant's RFC "is the most [she] can still do despite [her] limitations." 20 C.F.R. § 404.1545(a)(1). In assessing a claimant's RFC, an ALJ must consider "all of the relevant medical and other evidence," including a claimant's subjective complaints of pain. *Id.* § 404.1545(a)(3). An ALJ's RFC determination must be supported by substantial evidence<sup>3</sup> in the record. See 42 U.S.C. § 405(g). If it is, that determination is conclusive and must be affirmed upon judicial review. See *id.*; *Perez v. Chater*, 77 F.3d 41, 46 (2d Cir. 1996).

Despite Derda's claims, the ALJ's RFC assessment is legally sound and supported by substantial evidence. (See Dkt. No. 13 at 12-14.) First, the ALJ's determination that Derda could perform light work is consistent with Dr. Silverman's assessment that she can occasionally lift and carry twenty pounds. (See Tr. at 268.) According to the regulations, "[l]ight work involves lifting no more than [twenty] pounds at a time with frequent lifting or carrying of objects weighing up to [ten] pounds." 20 C.F.R. §

---

<sup>3</sup> "Substantial evidence is defined as more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion." *Alston v. Sullivan*, 904 F.2d 122, 126 (2d Cir. 1990) (internal quotation marks and citations omitted).

404.1567(b). Though Dr. Silverman restricted the frequency that Derda can carry twenty pounds, he did not place any limitations on her ability to carry less weight. (See Tr. at 268.) Even if he had, the ALJ still could have determined that Derda was capable of performing light work because she was able “to do substantially all of” the other activities associated with that exertion level. 20 C.F.R. § 404.1567(b); (See Tr. at 268-69.) And second, the ALJ’s decision to discount the portion of Dr. Rivera’s report which limited Derda’s ability to lift, push, pull and reach over her head was appropriate given the recency of the injury he cited, the lack of supporting medical evidence in the record, and Dr. Silverman’s comprehensive assessment. (See Tr. at 26, 269, 284, 287.) Moreover, Derda’s failure to mention a left shoulder impairment at the hearing, which occurred less than one-year after Dr. Rivera’s examination, only bolsters the ALJ’s decision to adopt less than all of the limitations Dr. Rivera recommended. (See Tr. at 31-56.) Accordingly, the ALJ’s RFC assessment is affirmed.

**C. Credibility Assessment**

Derda avers that the ALJ improperly assessed her credibility. (See Dkt. No. 13 at 14-17.) Again, the court disagrees, as a review of the ALJ’s opinion demonstrates that he only discredited Derda’s subjective

complaints to the extent that they were inconsistent with his RFC determination. (See Tr. at 24.) In finding as such, the ALJ provided a thorough explanation of the objective medical evidence that belied Derda's complaints. (See *id.* at 24-25.) He also noted that she "engages in a wide array of activities" of daily living, including cooking, cleaning, shopping and driving. (*Id.* at 25, 285.) Although Derda described far fewer abilities at the hearing, her conflicting statements provide further support for the ALJ's credibility determination. (*Compare id.* at 49-50, *with id.* at 285.) Because the ALJ properly weighed "the objective medical evidence in the record, [Derda's] demeanor, and other indicia of credibility," *Lewis v. Apfel*, 62 F. Supp. 2d 648, 651 (N.D.N.Y. 1999) (internal quotation marks and citation omitted), his credibility assessment is conclusive.

#### **D. Step Four Determination**

Derda's final argument—that the ALJ's Step Four determination is unsupported by substantial evidence—is also without merit because it assumes that there were errors in the RFC and credibility determinations. (See Dkt. No. 13 at 17-18.) However, because the court has already found

otherwise, it suffices to say that Derda's argument is untenable.<sup>4</sup> As such, the ALJ's finding at Step Four is affirmed. (See Tr. at 21.)

#### **E. Remaining Findings and Conclusions**

After careful review of the record, the court affirms the remainder of the ALJ's decision as it is supported by substantial evidence.

#### **VII. Conclusion**

**WHEREFORE**, for the foregoing reasons, it is hereby  
**ORDERED** that the decision of the Commissioner is **AFFIRMED** and  
Derda's Complaint (Dkt. No. 1) is **DISMISSED**; and it is further  
**ORDERED** that the Clerk close this case and provide a copy of this  
Memorandum-Decision and Order to the parties.

**IT IS SO ORDERED.**

December 21, 2012  
Albany, New York

  
\_\_\_\_\_  
Gary L. Sharpe  
Chief Judge  
U.S. District Court

---

<sup>4</sup> To the extent that Derda claims that the ALJ mischaracterized her prior work experience, (see Dkt. No. 13 at 18), that argument is also unpersuasive because, as the Commissioner notes, the job "Survey Worker" is nonetheless consistent with her RFC, (see Dkt. No. 15 at 19-20).